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Municipal Law Enforcements Role in Managing Homelessness: City is Permitted to Enforce Parks By-law Following *Poff v. City of Hamilton*, 2021 ONSC 7224

by

Monica Ciriello, BA, MA, MPP, JD
Director of Municipal Law and Licensing Compliance
City of Hamilton

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INTRODUCTION

The COVID-19 pandemic exacerbated the visibility of homelessness and the use of encampments on public and private property within municipalities across Canada.[1] The volume, size, and scale of encampments have increased in recent years particularly in small to mid-size municipalities, including the City of Hamilton ("City") in Ontario, Canada. With no end in sight, municipalities across the country, like Hamilton, have spent time and considerable resources to lay out plans on how to deal with the challenge of urban encampments.

Hamilton is a mid-size municipality with a population of approximately 600,000, that is located about 60 km west of the City of Toronto (Appendix "A"). The City forms part of what is considered the Greater Toronto and Hamilton area (GTHA), also collectively referred to as the 'golden horseshoe', named for its densely populated and highly industrialized geography. Over 20% of Canada's population lives in this quickly expanding, urban region of Ontario. While homelessness is not new to the City, encampments have traditionally been concentrated closer to the urban core of the larger centre, Toronto. During the Covid pandemic, the locations of encampments have expanded almost exponentially into the outer regions of the GTHA, including communities like Hamilton. In 2020, the City's municipal law enforcement officers (a separate law enforcement agency from the Hamilton police) were directed by the City Council to enforce the City's Park By-law that prohibits camping and the erection of tents or other structures in City parks. The City Council's decision, although hotly contested, ultimately

[1] In Canada approximately 235,000 people experience homelessness per year. Strobel, S., Burcul, I., Dai, J. H., Ma, Z., Jamani, S., & Hossain, R. (2021). Characterizing people experiencing homelessness and trends in homelessness using population-level emergency department visit data in Ontario, Canada. Health Reports, 32(1), 13–23. https://doi.org/10.25318/82-003-x202100100002-eng

passed with a narrow majority of Councillors, fueling a polarizing public debate within the City. At one end of the spectrum, residents pushed Councillors to rid their parks of tents, citing frustrations and concerns over safety, accumulating garbage, discarded needles, noise, theft, violence, sex trafficking and human urination and feces. While at the other end, advocates for the homeless within the community urged Councillors to let the homeless stay in encampments until affordable housing options that consider the challenges facing these individuals like substance addiction, and mental health were more readily available.

Encampments are a complex issue, with multiple factors contributing to individuals staying outdoors or choosing to “sleeping rough”. Those experiencing homelessness often perceive staying in an encampment as a safer option than staying on their own in low-quality housing, an unsheltered location, or in the shelter system. However, encampments create both real and perceived challenges not only for the occupants, but also for neighbours and the broader community. As the visibility of encampments within municipalities increases, so does the community’s expectation for elected municipal leaders to respond appropriately to this challenge. This places additional pressure not only on the elected officials, but also on the undertrained and understaffed municipal departments, and more recently the municipal law enforcement departments.

As elected officials and municipal leaders seek to respond, they are faced with the challenge of having to balance competing priorities and demands from a diverse group of voting stakeholders, that include community residents that are concerned for their safety, and business owners that as a result loose customers, and the advocates for the homeless populations in the encampments themselves. Further complicating these

issues are the competing priorities of internal municipal stakeholders including but not limited to housing, public health, the police, emergency services, and of course municipal law enforcement. Local responses to encampments are evolving in many communities, as stakeholders seek to identify the best strategies to address this growing phenomenon with limited resources. Currently, approaches vary across municipalities from sending in police to sweep the encampment, to formally sanctioning encampments and providing onsite services (Appendix “B”).

Municipal law enforcement officers have evolved into playing a critical role in responding to homelessness, finding themselves responsible for enforcing various pieces of legislation to control and regulate public spaces, including the enforcement of the Parks By-law. Through enforcing the Parks By-law, municipal law enforcement officers are now primarily relied upon to manage homelessness. Municipal law enforcement departments are finding themselves embroiled or intertangled in the work of addressing the larger issue of managing homelessness, a portfolio traditionally completed by public health, housing, and social workers. This new emerging reliance reinforces the need for greater service integration and the coordination between municipal departments.

In the fall of 2021, the City was challenged for having municipal law enforcement officers enforce its Parks By-law. In *Poff v. City of Hamilton*[2], an application was brought by the Hamilton Community Legal Clinic (“Legal Clinic”) on behalf of five homeless individuals living in encampments across the City. The Legal Clinic sought an interlocutory injunction to prohibit the City from enforcing its Park By-law until the section

[2] 2021 ONSC 7224.

7 of the *Canadian Charter of Rights and Freedoms*[3] ("*Charter"*), challenge was decided by the Court. Although the Court denied an application for an interlocutory injunction, thereby allowing the City to resume enforcement of its Parks By-law, the *Charter* challenge remains scheduled to proceed in 2023.

CASE LAW

Poff v. City of Hamilton, 2021 ONSC 7224, argued October 11, 18, 21 2021, decided by Justice A.J. Goodman November 2, 2021.

Background and Facts

The Applicants, collectively, Ashley Poff, Darrin Marchand, Gord Smyth, Mario Muscato, and Shawn Arnold are homeless individuals living in encampments throughout the City. The Applicants sought an interlocutory injunction to prohibit the City from enforcing its Parks By-law No. 01-219 ("Parks By-law") that prohibits camping and the erection of tents or other structures in City Parks until the full merits of the *Canadian Charter of Rights and Freedoms*[4] application is decided by the Court.

Throughout the COVID-19 pandemic, there has been a significant increase in the visibility of homeless individuals residing in encampments, prompting the enforcement, and dismantling of encampments under the Parks By-law. In the summer of 2020, the

[3] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
[4] *Ibid*.

Legal Clinic sought an injunction against the City[5] the matter was settled following the City's adoption of an "Encampment Protocol".[6]

On August 9, 2021 Hamilton City Council repealed the Encampment Protocol that permitted encampments in certain areas and of certain sizes within City Parks, in favour of resuming the enforcement of the Parks By-law.

The relevant sections of the Parks By-law read:

> 12. (a) Unless expressly authorized by permit, no person shall encroach upon or take possession of any park, or any part or area within a park, by any means whatsoever, including but not limited to the placing, construction, installation or maintenance of any fence, structure or other thing, the dumping or storage of any materials, or by planting any plant or otherwise cultivating, grooming or landscaping any part of the grounds thereof;
>
> 17. Unless authorized by permit, no person shall dwell, camp or lodge in any park.

The encampment enforcement under the Parks By-law follows a six-step process that begins with a complaint to Municipal Law Enforcement ("MLE") and ends with enforcement by Hamilton Police Services ("HPS"), and cleanup of the site. The process

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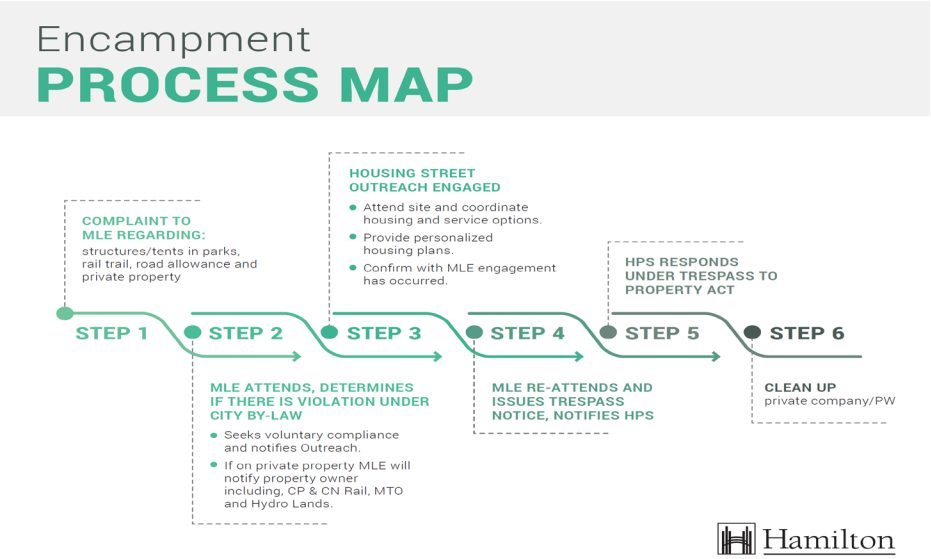
[5] Court File No. CV-20-73435

[6] The Enforcement Protocol provides that: **Prohibited Areas:** all individuals experiencing homelessness in encampments – even when deemed high acuity or engaged with outreach in the 14-day grace period outlined above – are subject to the following restrictions and may be removed or moved if not in compliance with them:

- No more than 5 in an encampment;
- No encampments on sidewalks, roadways or boulevards;
- Encampments must not encumber an entrance or exit or deemed fire route;
- Encampments must be 50 metres from a playground, school or childcare centre;
- No encampments within any property with an environmental or heritage designation; and
- Situations where health and safety concerns exist for those living within or adjacent to an encampment will be addressed in a reasonable fashion, in good faith, on a case by case basis by the City in its sole discretion that balances the needs of both the person experiencing homelessness/encamped individuals and community members. In these situations, the City will consult with the Encampment Task Force and the City's Mental Health and Street Outreach team to determine how to best balance the needs of persons experiencing homelessness/encamped individuals and other community members.

is initiated by a complaint (Step 1). MLE attend the site to determine if there is a violation of a By-Law, provides education and seeks voluntary compliance (Step 2). If there is no voluntary compliance, Housing Focused Street Outreach attends the site and provides various types of support (Step 3). If a violation of the by-law continues, MLE re-attends and issues a trespass notice and notifies Hamilton Police (Step 4). The next step is for the police to response under the Trespass to Property Act, R.S.O. 1990, c. T.21 (Step 5). The final step is clean up of the site after the encampment is gone (Step 6).[7]



Arguments

The Court applied the three-pronged test outlined in *RJR-MacDonald Inc. v. Canada (Attorney General)*[8] to determine whether an interlocutory injunction should be granted. First, the Court considered whether there was a serious issue to be tried. The Applicants argued that the removal of homeless individuals from encampments in City

[7] *Poff v. City of Hamilton*, 2021 ONSC 7224 at para. 13.
[8] [1994] 1 S.C.R. 311.

Parks invoked constitutional protections guaranteed under section 7 of the *Charter.*[9] The City argued that the first prong could not be met as the Applicants' claim under section 7 of the *Charter* as housing is not a *Charter*-protected right. The Court not weighing on the potential success of the arguments was satisfied that the Applicants' evidence support that a *Charter* protected right may be violated which was a serious issue to be tried.

Second, the Court considered whether irreparable harm would result if an injunction was not granted. The Applicants argued that as a result of the City's housing crisis the City does not have enough space to accommodate homeless individuals and as a result they must live in encampments. Further, the Applicants would suffer irreparable harm if they were removed from encampments without housing. The Applicants also took issue with the City's enforcement strategy, suggesting that housing was not a pre-requisite for enforcement. The City argued that the Applicants failed to demonstrate that enforcement of the City's Park By-law leads to irreparable harm, as there was no evidence that the Applicants' rights under the *Charter* were violated as section 7 does not confer a general freestanding right to housing. Further, the City argued that parks are a valuable public asset that should be available for to everyone. With the proliferation of encampments, City park activities now include fatalities, sex trafficking, discarded needles, drugs and garbage. The Court held that case law does not grant homeless individuals a freestanding right to erect encampments or to reside in public parks, as City parks are not intended for these activities.

[9] Section 7 of the Charter provides for "life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Third, the Court considered whether the balance of convenience favours granting an injunction. *RJR MacDonald* provides that public interest issues that contribute to tipping the balance of convenience may include concerns of society generally and that of identifiable groups. Based on the evidence presented, the Court held that the Parks By-law was quite clear, as it attempted to find a balance of what people can and cannot do in parks to allow all to enjoy them. Furthermore, the City provided affidavits from staff which demonstrated that shelter and housing spaces are available within the City, suggesting that some are choosing to sleep in City parks contrary to the valid Parks By-law.

Decision

The Court held that the Applicants did not meet the burden of establishing harm to the public interest that would rationalize suspending the City's ability to enforce the Parks By-law. Justice Goodman stated,

> I am persuaded that accommodations such as shelters and hotels have been made available and are responsive to the needs of encampment residents with the provision of necessary social supports. It is not perfect, but most homeless occupants can be reasonably accommodated by the City. Accordingly, in considering the litigants and the homeless-at-large in Hamilton, the applicants have not met the burden of establishing harm to the public interest that would rationalize suspending the City's ability to enforce its By-Law preventing camping and related activity in all of its parks. The relief sought would unjustifiably tie the City's hands in dealing with encampments that raise serious health and safety concerns for an indefinite duration, and would unduly prevent the use of parks by others.[10]

Suspending enforcement would unduly prevent the use of City parks by others. The Court held that the Parks By-law is a valid exercise of City power under the *Municipal Act, 2001,* S.O. 2001, c. 25. The request for injunctive relief overreached as it asked the Court to

[10] Para. 247.

prevent, for an indeterminate time, any implementation of the City's valid authority. Justice Goodman concluded that,

> No reasonable person in Canada would disagree with the proposition that homelessness, wherever and however it occurs, is a tragedy in Canada. However, the narrow issue before me is whether the City's enforcement of the By-Law should be restrained by court order. It is not a wide-sweeping review of the underlying issue of whether more should be done to help the homeless.[11]

In conclusion Justice Goodman provided that "[…] it bears repeating that the applicants neither advocate nor suggest that encampments are a permanent solution to the plight and challenges facing the homeless and marginalized members of society. Clearly, encampments are not places where the homeless should be residing."[12] The Applicant's motion for interlocutory injunction was denied.

CONCLUSION

On November 2, 2021 following the Superior Court's decision, the City resumed enforcement of Parks By-law that prohibit camping on City property, including park areas. The City's enforcement approach aimed to balance the safety and well-being of individuals experiencing homelessness, as well as those of the broader community, including access to green space for safe outdoor recreational activity.

In enforcing the City's Parks Bylaw, municipal law enforcement is the first point of contact when responding to Park By-law violations, which allows the housing outreach team to remain focused on their core role of engaging and connecting homeless individuals to housing and available services (Appendix "C"). Ticketing those who are homeless is not a course of action, though, if necessary and after all efforts to connect

[11] Para. 249.
[12] Para. 244.

individuals to appropriate alternative options are exhausted, a trespass notice is issued. Once a trespass notice is issued, the continued occupation is enforced by Hamilton Police Services. Often this results in homeless individuals being moved to another area within the City, rather than relying on police responses, such as ticketing or formally arresting individuals. Public works plays a significant ongoing role to ensure that encampment sites are cleaned and cleared in a timely fashion.

On March 30, 2022, Hamilton City Council gave approval to step up enforcement and the dismantling of encampments in City parks. City Council voted in favour of issuing trespass notices within 72 hours of a first complaint being received and implementing a seven-day-a-week municipal law enforcement operation. Despite the challenges, the City reimaged the opportunity it was presented, to meet the timelines staff sought approval to create a Coordinated Response Team ("CRT"), made up of stakeholders from a variety of municipal departments, including housing, municipal law enforcement and public works-parks. The CRT comprises of a Director, Manager, Senior Project Manager, Supervisor, and four municipal law enforcement officers. The CRT leads daily roundtable discussions with a variety of agencies, including the police, to discuss daily challenges including encampment locations, cleanliness, risk factors, number of individuals, whether the encampment is on private or publicly owned property, and agreed upon next steps. This coordinated approach has allowed for greater service integration and has allowed staff to maximize enforcement efforts, while minimizing the impact on those who need assistance.

Since March 2022, the CRT have actioned approximately 737 encampment investigations on public and private property, resulting in 32 notices of trespasses issued. Voluntary compliance was achieved at the remaining sites.

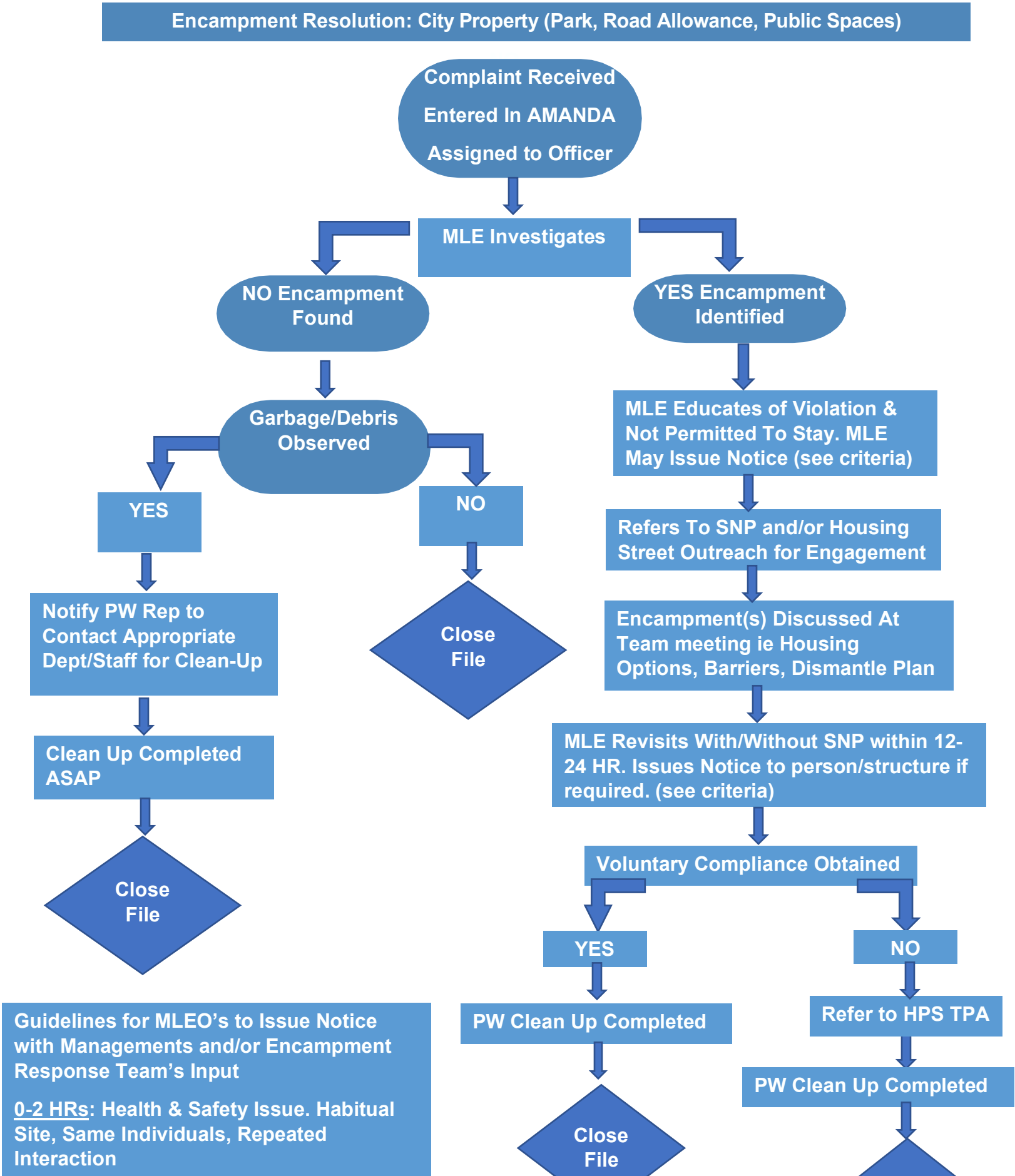
Appendix "A"


Georgian Bay
Muskoka
Haliburton
Beausoleil First Nation
Orillia
Chippewas of Rama First Nation
Peterborough
Kawartha Lakes
Curve Lake First Nation
Barrie
Peterborough
Chippewas of Georgina Island First Nation
Simcoe
Hiawatha First Nation
Alderville First Nation
Mississaugas of Scugog Island First Nation
Northumberland
Dufferin
York
Durham
Peel
Wellington
Toronto
Guelph
Lake Ontario
Halton
Waterloo
Brantford
Hamilton
Brant
Six Nations of the Grand River First Nation
Niagara
Mississaugas of the Credit First Nation
Haldimand
Lake Erie
Greater Golden Horseshoe Study Area
Legend:Administrative Boundaries
Lower Tier Municipal Boundaries
Upper/Single Tier Municipal Boundaries
Greater Golden Horseshoe Boundary
* The GGH study boundaries include parts of MNO regions 7, 8, and 9
First Nation Reserve Boundary

Appendix "B"

Approach	Factors
Law and Order: Clearing an Encampment with No Support	- Enforcement led - Short notice of clearing provided if at all - No shelter services/referrals provided - Regulatory or physical barriers introduced to secure the site and prevent new encampment from forming - No temporary storage options
Supports: Clearing an Encampment with Support	- Outreach led - Notice of clearing provided in advance - Shelter services/referrals are provided - Temporary storage options available - Encampment cleaned following clearing
Acceptance: Formal Sanction Encampment Site	- Encampments permitted on public or private property - May have regulations to govern the size, location or duration of encampments - May have infrastructure or public services on site - Storage options available on site - Services come to the encampment site

Appendix "C"


Encampment Resolution: City Property (Park, Road Allowance, Public Spaces)
Complaint Received
Entered In AMANDA
Assigned to Officer
MLE Investigates
NO Encampment Found
YES Encampment Identified
Garbage/Debris Observed
YES
NO
Notify PW Rep to Contact Appropriate Dept/Staff for Clean-Up
Close File
Clean Up Completed ASAP
Close File
MLE Educates of Violation & Not Permitted To Stay. MLE May Issue Notice (see criteria)
Refers To SNP and/or Housing Street Outreach for Engagement
Encampment(s) Discussed At Team meeting ie Housing Options, Barriers, Dismantle Plan
MLE Revisits With/Without SNP within 12-24 HR. Issues Notice to person/structure if required. (see criteria)
Voluntary Compliance Obtained
YES
NO
PW Clean Up Completed
Close File
Refer to HPS TPA
PW Clean Up Completed
Guidelines for MLEO's to Issue Notice with Managements and/or Encampment Response Team's Input
0-2 HRs: Health & Safety Issue. Habitual Site, Same Individuals, Repeated Interaction